No. 6445.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of the Application of FOO GUEY and FOO WUNG, For a Writ of Habeas Corpus.

Foo Guey and Foo Wung,
Appellants,

vs.

Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles, California.
Appellee.

BRIEF IN BEHALF OF APPELLANTS.

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TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

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STATEMENT OF THE CASE.

This appeal is taken from the order of the District Court for the Southern District of California, Central Division, denying the petition for a writ of habeas corpus [Tr. of R. pp. 13-14]. A memorandum opinion was rendered by the court below [Tr. of R. pp. 14-16].

The proceeding arose in the court below by the presentation in behalf of the appellants, by their father, Foo Fu,

of a petition for a writ of habeas corpus [Tr. of R. pp. 3-7], asking their discharge from the custody of Walter E. Carr, as District Director of Immigration for the port of San Pedro, the respondent in the court below and the appellee herein.

FACTS OF THE CASE.

The appellants herein sought admission to the United States at the port of San Pedro on March 18, 1930, as members of the mercantile class of Chinese, to wit, the minor sons of the lawfully domiciled Chinese merchant, Foo Fu. The lawfulness of the presence in the United States of the said Foo Fu, and the fact that he is a merchant, to wit, a person engaged in the buying and selling of merchandise at a fixed place of business, were conclusively proved and, of course, conceded by the immigration authorities. Appellants sought admission pursuant to the treaty with China of 1880 (22 Stat. L. 826) and the laws passed in execution of such treaty, commonly called the Chinese exclusion laws (22 Stat. L. 58; 23 Stat. L. 115; 25 Stat. L. 476; 27 Stat. L. 25; 28 Stat. L. 7; 32 Stat. L., Part I, 176; 33 Stat. L. 394, 428), as that treaty and those laws have been construed by the Supreme Court of the United States (*United States v. Gue Lim,* 176 U. S. 459, 44 L. Ed. 544; *Cheung Sun Shee v. Nagle,* 268 U. S. 336, 69 L. Ed. 985).

By stipulation [Tr. of R. p. 24] the original files and records of the United States Department of Labor covering the application of appellants for admission to the United States are to be by the clerk of the District Court sent up to the clerk of this court, as part of the record on

appeal. In discussing the various pertinent details of this case references will, accordingly, be made herein to the transcript of the administrative examination accorded appellants and their witnesses by the Immigration Board of Special Inquiry at San Pedro on March 18, 1930, to which reference will be made as "Transcript of Department Record" [Tr. Dept. R.].

At the conclusion of the administrative hearing, a member of the Board (the Chairman and the other member concurring) moved "that the appellants, Foo Guey and Foo Wung, having failed to establish their relationship as claimed, be debarred as aliens of a race ineligible to citizenship and not exempted by any of the provisions of Section 13 (c) of the Immigration Act of 1924; as persons not in possession of unexpired immigration visas; and as persons of the Chinese race not in possession of duly visaed Section 6 certificates; and that Foo Wung be denied admission on the additional grounds that he is a person under sixteen years of age not accompanied by or coming to join one or both parents; and that both applicants be debarred as persons likely to become public charges." [Tr. Dept. R. p. 23.]

It will be noted, however, that none of the stated grounds for exclusion would, or could, have been maintained by the Board of Special Inquiry otherwise than upon the stated belief and conclusion of the members of such Board that the two applicants (appellants) had "failed to establish their relationship" to the lawfully domiciled merchant, Foo Fu. Therefore, the only question really involved in the case was that of such relationship.

An appeal to the Secretary of Labor was taken from the excluding decision rendered by the Board of Special Inquiry, and on 1930, such appeal was dismissed by said Department, and the decision of the Board at San Pedro affirmed, for reasons stated in a memorandum prepared by the Board of Review in the office of the Secretary of Labor (Department record No. 55704/782, memorandum on blue sheet, bearing date last stated).

Thereupon the writ of habeas corpus which carried the case before the District Court was applied for, on the ground stated in Paragraph IX of the petition [Tr. of R. p. 5], to wit, that the immigration officials in ordering deportation had acted in excess of the authority and power committed to them by the statutes, that the appellants had been denied the full and fair hearing to which entitled under the law, and that, therefore, the appellants were being unlawfully confined, imprisoned and restrained.

As will be seen when the transcript of the administrative hearing is read, the appellants were, respectively, examined at great length with regard to matters affecting themselves and various members of their family and with regard to the village in China from which they claim to come; that they were asked very few questions with regard to the house in which they and the other members of their family have lived, or with regard to the domestic arrangements and customs of the family; and that their father and their older brother (admitted to the United States in 1922) were asked no questions with regard to the village; and that neither appellants nor either of their witnesses was cross-examined or afforded any opportunity to explain supposed disagreements in their testimony as

compared with that of the others, and that this applied particularly to questions answers to which were descriptive of the village as the father last knew it in 1919 and as the brother knew it in 1922.

It will be observed also that the excluding decision and the order to deport were based to a very considerable extent upon "discrepancies" between the descriptions of the village as the village existed more than eight years previously and the descriptions given of it by the appellants, respectively, and covering it at the time of their then very recent departure from such village.

QUESTIONS INVOLVED.

As already seen, the one point fundamentally at issue in the case, as resulting from the application of appellants for admission to the United States, was their relationship to the alleged father; for both their minority and the mercantile status of such father were conclusively proved and conceded.

It is conceived, as the matter now comes before this Honorable Court, the inquiry should be directed to determining whether or not the hearing conducted by the immigration officials was fair, and whether or not the conclusions of those officials were supported by substantial evidence or were simply arbitrary and in abuse of the discretion conferred upon such officials by law.

ARGUMENT.

I.

The Hearing Conducted by the Immigration Officials Was Unfair Because It Did Not Afford Appellants and Their Interested Relatives (Father and Brother) a Full and Complete Opportunity to Testify on Material Matters.

In order that fairness may obtain in an administrative hearing such as that here and now under review, the course pursued by the immigration officials should constitute "a fair investigation" (*Low Wah Suey v. Backus,* 225 U. S. 460, 56 L. Ed. 1165); the authority of the immigration officials should be "fairly exercised, that is consistently with the fundamental principles of justice embraced within the conception of due process of law" (*Tang Tun v. Edsell,* 223 U. S. 673, 56 L. Ed. 606); and however summary such hearing may be in form it must be one conducted "in good faith" (*Chin Yow v. U. S.,* 208 U. S. 8, 52 L. Ed. 369); and, in order to constitute a basis for an adverse decision, such hearing must produce evidence adequate to support such finding (*Zakonaite v. Wolf,* 226 U. S. 272, 57 L. Ed. 218); and—of the utmost importance—the hearing must be one in which the power delegated by Congress to immigration officials is "administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race." *Kwock Jan Fat v. White,* 253 U. S. 454, 458, 464, 64 L. Ed. 1010, 1012, 1014.

The record discloses substantial agreement between the four parties whose testimony was taken with regard to

the main items of information concerning the family to which such parties claim to belong. This substantially agreeing testimony upon material points lays a substantial basis for the belief that the claim of relationship advanced in this case is true. *Gung You v. Nagle*, 34 Fed. (2d) 848; *Hom Chung v. Nagle*, 41 Fed. (2d) 126, both decided by this Honorable Court.

Although the Board of Special Inquiry at San Pedro set up categorically twenty-two items with regard to applicant Foo Guey and eighteen items with regard to applicant Foo Wung [Tr. Dept. R. pp. 20-22], which such Board designated as discrepancies supporting its decision adverse to appellants, when the case came before the Department of Labor for review the Department found itself obliged to concede that almost all of these enumerated discrepancies could "be explained away as due to errors in memory." In affirming the decision of the San Pedro Board and ordering deportation the Department of Labor based its decision upon the three propositions now herein taken up for discussion.

In 1919, when the father returned from a visit to China, and more particularly in 1922, when the older brother of appellants applied for admission and was admitted, answers were recorded to certain questions with regard to the village in which the family lived in China; and, when appellants were examined at San Pedro the questions asked "closely follow" those propounded on the previous occasions [Tr. Dept. R. p. 19]—that is, the questions asked appellants, for no questions dealing with the description of the village were asked either the father or the brother.

Even in China, and especially there since the establishment of the Republic, and the resulting stirring up of the people and the creating among them of a spirit of restlessness theretofore unknown in that ancient and conservative country, many changes can take place in any community, urban, suburban, or rural, in the course of eight or more years; indeed, important or even revolutionary changes may occur over night. Obviously, therefore, it was not fair, simply upon the face of things, for the immigration officials to use, as a comparison-basis against the testimony of appellants' statements which had been made with regard to this village by their father and brother eight or more years ago. The said two relatives should have again been examined—not because they could possibly have claimed or shown any personal knowledge of changes in the village, but because it is reasonable to believe that, in the natural course of events, they would have learned from the members of the family in China of at least some of these changes, if such changes had actually occurred, and because they were entitled to an opportunity of this kind to make an explanation if they could possibly do so.

There is another reason of the utmost importance which the immigration inspectors, *in whose hands exclusively were both the opportunity and the method of developing the facts,* should have questioned the father and brother currently with regard to the village. There is no absolute certainty that the 1919 and the 1922 records are correct in what they purport to show with regard to the statements then made by these witnesses concerning the village. As was pointed out by District Judge Dietrich of the Western

District of Washington, in *Ex parte Cheung Tung,* 292 Fed. 997, 1000, testimony in Chinese cases is always taken under circumstances rendering mistakes highly probable—errors of interpretation, of transcription, of inadvertence or misunderstanding—errors which often there is no opportunity to correct and which become perpetuated for that reason.

The transcript of the administrative hearing in the case now under consideration carries within itself several signifiant illustrations of how easy it is for misunderstanding to arise on a matter of this kind. On page 1 of such transcript appellants' father is recorded as stating "I was born in the Nam Hoy Gow Kong District, in the Sai Juey village." On page 3 he is shown to have stated that appellants had been attending school in Sar Juey village, whereupon these questions and answers were put down:

> "Q. Of what city is the Sar Juey village a part? A. It is part of the Gow Gong District.
>
> Q. Is Gow Gong a city? A. No.
>
> Q. You stated in 1919 that Sar Juey was a portion of Gow Gong city? A. Gow Gong market, not Gow Gong city.
>
> Q. Then why did you say it was part of the Gow Gong city, you had just come from there? A. There is the Gow Gong District and in that is the Gow Gong market, maybe they misunderstood me and thought I said Gow Gong city.
>
> Q. You further said that you were born in the Gow Gong City and didn't mention the market. A. I was born in the Gow Gong market, Sar Juey village.
>
> Q. You said that you were born in the Gow Gong city, N. H. dist.? A. I was born in the Sar Juey village in the Gow Gong dist."

On page 4 appellants' brother is recorded as stating: "I was born in the Sar Juey village, Gow Gong Nam Hop Dist., China," and then these questions and answers were put down:

> "Q. How does it come that you give a different place of birth now from that you gave when you were admitted in 1922? A. Gow Gong Sar Juey Fook Lay.
>
> Q. What is the name of your village? A. The Sun Fook Lay.
>
> Q. Then why did you call it something else a while ago? A. They call it Sar Juey or the Sun Fook Lay.
>
> Q. What is it commonly known as? A. Sar Juey village.
>
> Q. Then why did you say in 1922 that you were born in the Gow Gong village Sun Fook Ley subdivision, Nam Hoy Dist.? A. I didn't say that."

Any one at all familiar with the geographical and political divisions of Kwong Tung Province, China, knows that Nam Hoy (not Hop) is one of the numerous districts (heins), corresponding substantially to the county divisions of our states, into which the said province is divided. Obviously the father could not have said in the present hearing that he was born in "Nam Hoy Gow Kong District," for there is no such district. Obviously, also, he did not state, as he is recorded as stating on page 3, that there is "the Gow Gong District." Undoubtedly what he said was that there is a subdivision of Nam Hoy District known as Gow Gong, and there is a market in that subdivision also known as Gow Gong. Quite as clearly, he did not say in 1919 that he was born in Gow Gong city, there being no such city in that part of China. So that both the 1919

record and the present record are inaccurate in that regard. Just as obviously appellants' brother did not state in 1922 that he was born in "Gow Gong village, Sun Fook Ley subdivision, Nam Hoy Dist." Undoubtedly what he said in 1922 was what he now says, to wit, that he was born in Sun Fook Ley (also sometimes known as Sar Juey Lay—*the word Ley, Lay, or Lee being the Chinese equivalent of the English word village*), Gow Gong subdivision, Nam Hoy District; for although he is recorded [p. 4] as stating in the present hearing that he was born "Sar Juey village, Gow Gong Nam Hop Dist.," his answer should have been recorded as "in the Sar Juey village, Gow Gong subdivision, Nam Hoy District." Probably this rather ignorant Chinese should not be credited with any expert knowledge of geography, but he should at least be given credit for knowing the geography of his own particular section of China; and, taking his testimony as a whole, and correcting the obvious misinterpretations or erroneous transcriptions appearing therein, it is clear that he now knows, and knew in 1922, the actual facts of this matter.

If mistakes of this kind are so easy to discover in the 1919 and 1922 records, simply by an analysis of the testimony given in the present proceeding, it is certainly reasonable to suppose that other errors may have existed in the 1919 and 1922 records; and no opportunity was afforded in the present hearing for any correction or explanation of those errors, but the testimony of the father and brother with regard to the village, as such testimony was then recorded, was taken as necessarily being correct, as necessarily representing the village as it now exists over eight years later, and consequently it was concluded

on the basis of the testimony of appellants that they did not hail from the same village as their two witnesses and could not therefore be the sons and brothers, respectively, of those witnesses.

It is apparent that both appellants know the village by the name *Sun Fook,* by which it has been called recently (and which is also the name of the boat landing in the immediate vicinity of such village), and are not so familiar with the old name of the place, *Sar Juey,* which is the name with which the father and brother were most familiar undoubtedly because when they were there the village was most commonly called by that name [Tr. Dept. R. pp. 6, 8, 12, 13-14, 18-19]. But there is nothing strange about this; Chinese village names frequently change, and it is easily seen from the testimony that all of the parties know that the place has the two names, and that they are all talking about the same place.

But, it is said, they cannot be talking about the same place because appellants' testimony shows that the so-called "village" contains only three houses and that they do not recollect that it ever contained more than four, whereas it was testified in 1922 that there were six buildings therein; that they cannot be referring to the same place because it was indicated in 1922 that there was an ancestral hall in the "village," and it is now said by appellants that there is none; that they cannot be referring to the same place because appellants claim the village "faces" east, whereas it was stated in 1922 that it "faced" west; and because appellants gave certain names for inhabitants of the "village" that were not given in 1922 and do not

recognize certain names that were given in 1922 as the names of neighbors.

The answers to these things are simply that changes may have taken place during the more than eight years intervening; that the "village," so called, is merly a small group of houses located near a market-town, described by inaccurate interpretation in the present record as consisting of three houses, "all in one row, two in front and one in back"—an obvious impossibility—[Tr. Dept. R. pp. 10, 16]; that it is obvious from the present record that appellants are not at all familiar with the points of the compass —in which they do not differ from Chinese quite generally; that in talking about such a group of houses, rurally located, it would be easy for one or two persons to include in the group isolated buildings nearby, and for one or two others not to regard those buildings as within the group; that this "village," which, unlike Chinese villages generally, has no "head" or "tail" [Tr. Dept. R. pp. 10,16], and which obviously is irregularly arranged, that is, not in a straight row, might easily be regarded by one or two persons as facing one way; and by one or two others as facing in the opposite direction; and that the mentioning, when discussing neighbors, of names not mentioned in 1922, and the failure to recall as neighbors persons so named in 1922, may be due either to changes in inhabitants, or to a changing (according to Chinese customs) in the names of inhabitants, or to births, deaths, etc.; and that, above everything else, careful questioning of the father and brother on the basis of the testimony given by appellants, and the affording of even a slight opportunity to make explanations, might have cleared away every element the least substantial of this matter.

These administrative proceedings with respect to aliens applying for admission to the United States are conducted in an absolutely *ex parte* manner. The evidence is elicited from the principals and their witnesses by the propounding of such questions, put in such form, as the immigration officials choose to ask and formulate. There is no opportunity for cross-examination or for interested parties in that way or otherwise, by themselves or with the assistance of those qualified to assist, to bring out the evidence completely and lucidly. But these very circumstances render it all the more incumbent upon the officials to carry their interrogation and investigation far enough to develop the material facts and to make certain that those testifying are given full opportunity to tell all they know.

> "When Congress vested in these administrative tribunals the power of determining family relationship * * *, it freed them from the technical methods of proof that courts have, but not from the obligation of seeking the truth with open and reasoning minds." *Mason ex rel. Lee Wing You v. Tillinghast,* 27 Fed. (2d) 580, 581, C. C. A., 1st. Cir.

A case very much like the one at bar, in the circumstance that the administrative officials had given significance to discrepancies in the descriptions of a Chinese village made at widely separated periods, is *United States ex rel. Noon v. Day*, 44 Fed. (2d) 239-240, District Court, S. D. of New York. In that case the writ was sustained.

Reasonable opportunity should always be allowed in these cases for witnesses to explain apparently disagreeing testimony. *Hom Chung v. Nagle*, 41 Fed. (2d) 126, 128, 129; *Wong Bing Pon v. Carr*, 41 Fed. (2d) 604, 605, both decided by this Honorable Court.

II.

The Decision of the Immigration Authorities Was Not Supported by Substantial Evidence.

It has been held repeatedly that decisions in these administrative proceedings, in order to be valid, must be supported by some substantial evidence. In the case of *Nagle v. Wong Ngook Hong et al.* (decided January 26, 1928), the District Court for the Northern District of California ruled that "There is no material evidence in either case upon which the immigration authorities could rely to show that the claimed relationship was not established." That decision was affirmed by this Honorable Court. *Nagle v. Wong Ngook Hong et al.*, 27 Fed. (2d) 650.

In *Johnson v. Damon ex rel. Leung Fook Yung,* 16 Fed. (2d) 65-66, the ruling of the Circuit Court of Appeals, First Circuit, was that it is the province of the courts "to determine whether there was any substantial evidence" in support of the administrative decision. The same court held similarly in *Johnson v. Ng Ling Fong,* 17 Fed. (2d) 11, 12. And the Circuit Court of Appeals, Second Circuit, held in *United States ex rel. Leong Ding v. Brough*, 22 Fed. (2d) 926, 928, as follows:

> "But here the evidence does not warrant a reasonable mind holding that the appellant was other than he represented. The result below does not satisfy the requirement of a fair hearing. There is no substantial evidence to support the conclusion below. * * * There was no substantial evidence of contradiction on any material point, which would justify rejecting the testimony which amply supports the claim of the appellant * * *."

See also:

Fong Tan Jew v. Tillinghast, 24 Fed. (2d) 632, 636, C. C. A., 1st Cir.;

Tillinghast v. Wong Wing, 33 Fed. (2d) 290, C. C. A., 1st Cir.;

Chung Pig Tin v. Nagle, 45 Fed. (2d) 484, 485, C. C. A.. 9th Cir.

In the interest of brevity and lucidity a full discussion has been given under the preceding division of this brief of the discrepancies relied upon in the final administrative decision of this case, which arose with regard to the village from which appellants come and the inhabitants of that village, respectively. Considered in the light of all the agreeing testimony upon material points, those discrepancies could scarcely be regarded as substantial evidence against the claim of appellants, anyway; but when they are considered from the point of view of how easily they might have been cleared up or explained, had the hearing been conducted in that fair manner necessary to give full opportunity for the development of the evidence, they become utterly unsubstantial.

Aside from the supposed difference in the description of the village, and supposed failure of appellants to know the names of the neighbors in that village, the single point regarded as of any importance was the variation in the dates of birth of Foo Fu's children and in the order of age in which such children have been placed by Foo Fu. Here again, there enters in the "highly probable" occurrence that errors of interpretation or transcription were made in the old records. Moreover, it is clear from the present record [Tr. Dept. R. pp. 1, 2] that Foo Fu is one

of those frequently encountered fathers who cannot depend upon his own memory for the dates of the birth of his children.

There seems to be not the least doubt, on the evidence as a whole, that these two appellants are two of the children whom Foo Fu has always claimed to have whenever he had an opportunity of making such a claim. Surely the fact that this man, admittedly of poor memory, at one time may have become somewhat confused with regard to the exact order in age of his children, and has at no time been absolutely certain with regard to the exact dates of their birth, cannot be regarded as a substantial piece of evidence justifying the exclusion from the United States of two Chinese minors who claim to be entitled to enter as members of the mercantile class and whose father claims the right, under the decisions of the Supreme Court, to have them with him here.

III.

The Decision of the Immigration Authorities Was Arbitrary and an Abuse of Discretion.

This proposition follows inevitably from the discussion of the case under the preceding two divisions of this brief. It has repeatedly been held that a decision not supported by any substantial evidence is arbitrary and is beyond the powers conferred by law upon immigration officials. In *Fong Tan Jew v. Tillinghast, supra,* it was stated that an administrative finding, not "grounded on substantial evidence, or upon material discrepancies," amounted to a mere

"fiat"; and in addition to the cases cited under the preceding heading, attention should be directed to the following, all decided by this Honorable Court:

Go Lun v. Nagle, 22 Fed. (2d) 246, 248;

Wong Tsick Wye et al. v. Nagle, 33 Fed. (2d) 226, 228;

Gung You v. Nagle, 34 Fed. (2d) 848, 853;

Louie Poy Hok v. Nagle, No. 6349, penultimate paragraph, decided April 6, 1931.

CONCLUSION.

It is respectfully submitted (1) that the hearing conducted by the Immigration Officials was unfair because it did not afford appellants and their interested relatives (father and brother) a full and complete opportunity to testify on material matters; (2) that the decision of the Immigration Authorities was not supported by substantial evidence; and, (3) that the decision of the Immigration Authorities was arbitrary and an abuse of discretion. The order of the District Court therefore should be reversed with directions to issue the writ of *habeas corpus* and discharge appellants.

Dated this 10th day of September, 1931, at Los Angeles, California.

Respectfully submitted,

Y. C. Hong,

Attorney for Appellant.